

BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD

LIEL W. LAKE

Claimant

V.

WALMART

Respondent

AND

NEW HAMPSHIRE INSURANCE COMPANY

Insurance Carrier

Docket No. 1,070,523

ORDER

STATEMENT OF THE CASE

Respondent and its insurance carrier (respondent) appealed the September 3, 2015, Preliminary Order entered by Administrative Law Judge (ALJ) Steven J. Howard. William L. Phalen of Pittsburg, Kansas, appeared for claimant. Matthew R. Bergmann of Topeka, Kansas, appeared for respondent.

The record on appeal is the same as that considered by the ALJ and consists of the transcript of the August 28, 2015, preliminary hearing and exhibits thereto; the transcript of the June 26, 2015, preliminary hearing; the transcript of the October 24, 2014, preliminary hearing; the transcript of the January 13, 2015, discovery deposition of claimant; the transcript of the August 13, 2015, deposition of Dr. Michael Zafuta and exhibits thereto; the March 19, 2015, independent medical evaluation report by Dr. Lowry Jones, Jr.; and all pleadings contained in the administrative file.

ISSUE

The ALJ found:

Accordingly, and based upon the foregoing, claimant has sustained his burden of proving as more probably true than not that he sustained an injury as a result of the occupational occurrence on November 28, 2013, and that incident is the prevailing

factor in claimant's need for ongoing medical care and benefits pursuant to the Kansas Workers Compensation Act.¹

Respondent argues claimant injured his left shoulder while horseback riding on October 27, 2013, not during the November 28 incident at work. Claimant asks the Board to affirm the September 3, 2015, preliminary hearing order.

The sole issue is: did claimant, on November 28, 2013, suffer a left shoulder injury by accident arising out of and in the course of his employment?

FINDINGS OF FACT

Claimant, age 61, worked overnight maintenance for respondent, stripping and refinishing floors. Claimant testified that on November 28, 2013, he loaded leftover products from Black Friday into a trailer. Moving products was not part of his regular job duties. Claimant was pushing and turning a manual pallet jack to move a pallet of bagged dog food when his left shoulder popped. He experienced pain, his left arm was dangling and he could no longer use it. According to claimant, the pallet jack weighed 175 pounds and some of the wheels were broken.

Claimant worked until the end of his shift, which was 7 a.m., and before going home, told his supervisor of the injury. After his shift ended, claimant went to the emergency room for treatment. Respondent sent Josh, another supervisor, to the emergency room and he had claimant complete a form. Claimant was off work three days and then returned to work, but only pushes a broom using his right arm.

On October 27, 2013, claimant was riding his horse when the saddle slipped sideways. As claimant was falling off his horse, he grabbed a barbed wire fence with his left hand, injuring his left shoulder. Claimant went to Via Christi in Pittsburg, where he was diagnosed with a dislocated left shoulder. At Via Christi, the left shoulder was reduced or put back in place. Via Christi's records indicated claimant tolerated the procedure very well. Via Christi's records indicated claimant sustained no fractures and do not mention any lesions.

After the October 27 incident, claimant missed several days of work and returned on November 4, 2013. Claimant had one follow-up appointment with his personal physician, Dr. Orender, and also saw Dr. McNemar, an orthopedic physician. Claimant testified that when he saw Dr. McNemar, his shoulder was fine. According to claimant, he was released by Drs. Orender and McNemar without restrictions. Drs. Orender and McNemar's records were not placed into evidence.

¹ ALJ Order at 5.

Claimant testified he had no issues with his left shoulder and had full strength after the horseback riding accident. He was pain free, had no symptoms and was able to do push-ups and pull-ups at home without any issues.

In May 2014, claimant again dislocated his left shoulder. He had just finished exercising at home as part of his physical therapy and was dressing to return to work. As claimant turned around to put on his coat, his left shoulder popped out. Claimant went to Via Christi and got his shoulder put back in place.

Dr. Michael Zafuta, a board-certified orthopedic surgeon, first saw claimant on November 28, 2013, and diagnosed claimant with a left anterior shoulder dislocation. At that time, Dr. Zafuta was aware of claimant's October 27 shoulder injury. Dr. Zafuta testified that a shoulder dislocation can cause a rotator cuff injury. From December 2013 through May 2014, Dr. Zafuta saw claimant several times and treated him conservatively with physical therapy and a home exercise program. On April 14, 2014, Dr. Zafuta saw claimant, who was still having left shoulder issues, but the doctor decided to give home exercise another six weeks.

On May 12, 2014, Dr. Zafuta's nurse practitioner, Aaron Shaw, saw claimant and an MRI was ordered. Mr. Shaw recommended claimant's left shoulder be immobilized and recommended no left hand activity.

On May 29, 2014, Dr. Zafuta reviewed the MRI results with claimant and recommended surgical repair of his left shoulder. According to Dr. Zafuta, the MRI showed: (1) a Bankart tear, which is an anterior and inferior labral tear, (2) a chip fracture of the glenoid rim, (3) a Hill-Sachs deformity of the humeral head, which is seen following a dislocation and (4) a partial thickness tear of the left rotator cuff. The doctor explained that a Hill-Sachs lesion is when the ball in the shoulder comes out during dislocation, causing an indentation in the ball, which can lead to future problems. Dr. Zafuta indicated the injuries revealed on the MRI were consistent with the mechanism of injury on November 28, 2013, described by claimant.

Dr. Zafuta reviewed claimant's medical records from his October 27, 2013, horseback riding accident. The doctor indicated claimant sustained a left shoulder dislocation, was released without restrictions by Dr. Orender, was pain free and returned to his job at respondent without problems.

According to Dr. Zafuta, studies have shown that the dislocation recurrence rate for a person over 40 who has dislocated his or her shoulder is actually lower than for a younger person. He testified the more likely problem with a person over 40 who initially dislocates a shoulder is a torn rotator cuff as opposed to a torn labrum, which can lead to recurrent dislocations. Dr. Zafuta testified claimant's November 28, 2013, accident led to the Bankart or labral lesion, which in turn caused the dislocation recurrence that requires

surgery. The doctor opined claimant's work accident was the prevailing factor causing claimant's left shoulder injury and need for the medical treatment he recommended.

Dr. Zafuta acknowledged that Bankart and Hill-Sachs lesions can be caused by the same accident and that the October 2013 horseback riding accident could cause a Hill-Sachs lesion. The doctor testified the radiologist report related to claimant's October 2013 accident did not mention a Hill-Sachs lesion. Dr. Zafuta also indicated that Via Christi's October 27 records indicated they had no difficulties reducing claimant's left shoulder and did not require the assistance of an orthopedic doctor.

At the request of his attorney, claimant was evaluated by orthopedic physician Dr. Edward J. Prostic on September 19, 2014. Dr. Prostic's report indicates he was aware of the treatment claimant received at Via Christi and by Dr. Zafuta for his November 28, 2013, accident, including the MRI results. Dr. Prostic was aware claimant suffered a left anterior shoulder dislocation as the result of the October 27, 2013, horseback riding accident and the treatment he received. The doctor ordered x-rays, which revealed a significant Bankart lesion. He opined claimant's November 28, 2013, work accident was the prevailing factor causing his left shoulder injury, medical condition and need for medical treatment. Dr. Prostic concurred with Dr. Zafuta that claimant needed left shoulder surgery.

By order of the ALJ, orthopedic surgeon Dr. Lowry Jones, Jr., evaluated claimant on March 19, 2015. Dr. Jones noted claimant's May 2014 MRI suggested an anterior Bankart tear with a large Hill-Sachs lesion, a partial fiber tear of the supraspinatus and a probable labral tear. Dr. Jones was aware of claimant's October 27, 2013, left shoulder injury and noted he suffered a left anterior shoulder dislocation. Dr. Jones' report does not indicate he reviewed claimant's medical records related to that incident.

Dr. Jones stated that an anterior dislocation routinely involves a significant Bankart lesion. The doctor indicated claimant's November 28 dislocation resulted because he had an active Bankart lesion, and the mechanism of injury would not have resulted in a dislocation had claimant not had a prior Bankart lesion. He then opined, within a reasonable degree of medical certainty, that claimant's October 27, 2013, accident, not the November 28 accident, was the prevailing factor causing his injury and need for medical treatment. Dr. Jones stated that although no MRI scan was obtained, the October 27 injury was a much more forceful injury, which explained the findings on the May 2014 MRI. Dr. Jones also recommended surgical treatment of claimant's left shoulder.

PRINCIPLES OF LAW AND ANALYSIS

The Workers Compensation Act places the burden of proof upon the claimant to establish the right to an award of compensation and to prove the conditions on which that

right depends.² “Burden of proof’ means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record unless a higher burden of proof is specifically required by this act.”³

K.S.A. 2013 Supp. 44-508(f)(2), in part, states:

(B) An injury by accident shall be deemed to arise out of employment only if:

- (i) There is a causal connection between the conditions under which the work is required to be performed and the resulting accident; and
- (ii) the accident is the prevailing factor causing the injury, medical condition, and resulting disability or impairment.

K.S.A. 2013 Supp. 44-508(f)(3)(A) states:

The words “arising out of and in the course of employment” as used in the workers compensation act shall not be construed to include:

- (i) Injury which occurred as a result of the natural aging process or by the normal activities of day-to-day living;
- (ii) accident or injury which arose out of a neutral risk with no particular employment or personal character;
- (iii) accident or injury which arose out of a risk personal to the worker; or
- (iv) accident or injury which arose either directly or indirectly from idiopathic causes.

The evidence shows claimant sustained a left shoulder injury by accident on November 28, 2013, arising out of and in the course of his employment. This Board Member finds little value in Dr. Prostic’s report. Dr. Prostic was employed by claimant, his report is brief and he did not sufficiently explain why he believed claimant’s November 28 work accident was the prevailing factor causing his left shoulder injury and need for medical treatment.

Dr. Jones’ prevailing factor opinion is based on two assumptions not supported by the medical evidence. Dr. Jones’ prevailing factor opinion was based upon an assumption that an anterior shoulder dislocation routinely involves a Bankart lesion. There is insufficient medical evidence that claimant’s October 27 horseback riding accident caused

² K.S.A. 2013 Supp. 44-501b(c).

³ K.S.A. 2013 Supp. 44-508(h).

a Bankart lesion. Dr. Jones' assumption that claimant's October 27 injury was more forceful is not supported by medical evidence and is contravened by claimant's testimony.

This Board Member finds the opinions of Dr. Zafuta most credible. Dr. Zafuta was the treating physician and saw claimant on several occasions. He reviewed medical records related to claimant's October 27 accident, including a radiological report that mentioned no Hill-Sachs lesion.

The medical evidence shows claimant suffered a left anterior shoulder dislocation on October 27, 2013, but no other injuries. Via Christi's records related to that incident indicated claimant had no fractures and did not mention lesions. Claimant's May 2014 MRI revealed Bankart and Hill-Sachs lesions, a chip fracture of the glenoid rim and a partial thickness tear of the left rotator cuff. Those are changes in the physical structure of claimant's body that were not present before his November 28 accident.

Moreover, claimant testified that following his October 27 accidental left shoulder injury, he was provided no restrictions, had no left shoulder pain or symptoms, had full strength and was able to do push-ups and pull-ups at home without any issues. After claimant's November 28 accident, his left arm was dangling and he could not use it. Several months of conservative treatment provided no relief and surgery was recommended. Surgery was not recommended after his horseback riding accident. As indicated above, claimant's testimony disputes Dr. Jones' opinion that the October 27 injury was more forceful.

By statute the above preliminary hearing findings are neither final nor binding as they may be modified upon a full hearing of the claim.⁴ Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2014 Supp. 44-551(l)(2)(A), as opposed to being determined by the entire Board when the appeal is from a final order.⁵

WHEREFORE, the undersigned Board Member affirms the September 3, 2015, Preliminary Order entered by ALJ Howard.

IT IS SO ORDERED.

⁴ K.S.A. 2014 Supp. 44-534a.

⁵ K.S.A. 2014 Supp. 44-555c(j).

Dated this ____ day of November, 2015.

HONORABLE THOMAS D. ARNHOLD
BOARD MEMBER

c: William L. Phalen, Attorney for Claimant
wlp@wlphalen.com

Matthew R. Bergmann, Attorney for Respondent and its Insurance Carrier
mbergmann@fuflaw.com; akonda@fuflaw.com

Steven J. Howard, Administrative Law Judge

Steven M. Roth, Administrative Law Judge